Nos. 76-653, 76-762, 76-769 and 76-774

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALLIED-GENERAL NUCLEAR SERVICES, ET AL., PETITIONERS
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

COMMONWEALTH EDISON COMPANY, ET AL., PETITIONERS
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

BALTIMORE GAS AND ELECTRIC COMPANY, ET AL., PETITIONERS
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE NUCLEAR REGULATORY COMMISSION

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1. On May 8, 1975, the Nuclear Regulatory Commission[1] published in the Federal Register a notice setting forth its provisional views on a variety of issues relating to the issuance of licenses for activities associated with the production and use of mixed oxide fuel.[2] At the same time, the Commission requested public comment on the issues discussed in the notice.[3] 40 Fed. Reg. 20142. Following consideration of the extensive comments received in response to the May 8th notice, the Commission published on November 14, 1975, an "interim policy statement" setting forth the conclusions it had reached on the issues covered in

[1] The Nuclear Regulatory Commission succeeded to the licensing powers of the Atomic Energy Commission on January 19, 1975 Energy Reorganization Act of 1974, 88 Stat. 1233–1254. See 40 Fed. Reg. 3242, 3520.

[2] Mixed oxide fuel (*i.e.*, fuel containing both plutonium oxide and uranium oxide) has been used on a limited basis for many years. The characteristics of this fuel, as well as its production and use, are described in the "interim policy statement" published by the Commission on November 14, 1975. 40 Fed. Reg. 53056. The text of the interim policy statement is set forth in Appendix A to the petition in No. 76–653 (hereafter "Pet. App.").

Nuclear reactors are typically fueled with uranium. After operation, the reactor's spent fuel contains uranium and plutonium, both of which can be extracted and used as fuel, thus extending energy supplies. This recycling is done by reprocessing and fuel fabrication plants, which convert the spent fuel into a form suitable for use by current reactors.

[3] The notice published by the Commission on May 8, 1975, followed an earlier policy statement published by the Atomic Energy Commission (AEC). 39 Fed. Reg. 5356 (February 12, 1974). The AEC had announced in the earlier notice that it intended to prepare a generic environmental impact statement dealing with the wide-scale use of mixed oxide fuel. See 39 Fed. Reg. 30186.

the earlier notice. In particular, the Commission's interim policy statement (1) announced that the wide-scale use of mixed oxide fuel in light water nuclear reactors "requires a full assessment of safeguards issues,"[4] (2) set forth the procedure and schedule to be followed in the preparation of a generic environmental impact statement on such wide-scale use, and (3) announced that it would entertain applications for licenses to permit, on several bases, certain activities related to the production and use of mixed oxide fuel during the period preceding a final decision on the wide-scale use of such fuel. 40 Fed. Reg. 53056, as corrected, 40 Fed. Reg. 59497 (December 24, 1975).

The Commission explained in the interim policy statement that its decision to entertain applications for interim commercial licenses relating to mixed oxide fuel, while delaying formulation of a general licensing policy governing the wide-scale commercial use of such fuel, was the product of a number of considerations. The Commission noted, *inter alia,* that "any public health and safety environmental issues associated with interim licensing can be addressed adequately under the Commission's regulations within the context of the reviews of the individual license applications" (Pet. App. A–22). The Commission also noted that, on the basis of previous environmental analysis of mixed oxide fuel and because of the limited

[4] "Safeguards" refer to measures designed to prevent improper use of plutonium, a toxic substance which can be used in the fabrication of atomic weapons (see Pet. App. A–2).

number and types of plants likely to qualify for interim licenses, the granting of interim licenses to particular projects prior to completion of the generic impact statement "would not result in the overlooking of any cumulative health and safety or environmental impacts or in the foreclosure of alternatives to other projects that could only be addressed in the generic environmental statement" (Pet. App. A-23). For the same reasons, the Commission concluded that interim licensing could go forward, under specified conditions, without resulting in such a substantial commitment of private resources so as to affect significantly the Commission's final decision on the wide-scale commercial use of mixed oxide fuel (*ibid.*).

The Commission also pointed out that a blanket moratorium on licensing commercial mixed oxide fuel activities, pending completion of a generic environmental impact statement,[6] could adversely affect the public interest in the development of alternative energy resources. According to the Commission (Pet. App. A-23 through A-24):

> Whether the decision * * * on wide-scale use of mixed oxide fuel is favorable or unfavorable, an absolute prohibition on the conduct of any related activities in the interim could result in the disruption or cessation of planning as well as the production of useful data. Such a prohibition could result in potentially serious delays in exploring alternatives which could contribute to meeting the nation's energy needs. This could impose future economic penalties on the American public through increased costs to electric utilities caused by delaying the use of resources available in spent fuel and requiring additional spent fuel storage facilities that otherwise would not be needed.

[6] A portion of the generic environmental impact statement was issued in final form in August 1976; hearings have begun on that portion. The remainder of the impact statement has not yet been issued in draft form.

The Commission accordingly announced in the interim policy statement that it would entertain applications for licenses for the commercial use of mixed oxide fuel during the period prior to completion of the generic environmental impact statement. It also advised potential applicants that whether specific fuel recycle activities, involving mixed oxide fuel, would be authorized in the interim period would be determined within the context of individual licensing proceedings.

In addition to the criteria established by the Atomic Energy Act of 1954, 68 Stat. 948, as amended, 42 U.S.C. (and Supp. V) 2201 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, the Commission stated that for mixed oxide fuel facilities, such as reprocessing and fuel fabrication plants, applications for interim licenses would be considered in light of the following factors (Pet. App. A-25 through A-26):

> (1) Whether the activity can be justified, from a NEPA cost-benefit standpoint, without placing primary reliance on an anticipated favorable Commission decision on wide-scale use of mixed oxide fuel;

(2) Whether the activity would give rise to an irreversible and irretrievable commitment of resources that would unjustifiably foreclose for the activity substantial safeguards alternatives that may result from the decision on wide-scale use; and

(3) The effect of delay in the conduct of the activity on overall public interest.[6]

2. After publication of the Commission's interim policy statement on the use of mixed oxide fuel, the Natural Resources Defense Council (NRDC)[7] and the State of New York filed similar petitions for review in the court of appeals.[8] The petitions sought, *inter alia,* reversal of the Commission's decision to entertain applications for interim licenses on the ground that the granting of any such licenses prior to completion of the generic impact statement would violate

[6] The Commission exempted from application of these criteria the use of mixed oxide fuel in existing reactors. The Commission noted that such use required little capital investment, was reversible and could not reach wide-scale dimensions in the interim period because of the limited availability of mixed oxide fuel (Pet. App. A-26 through A-27). For similar reasons, the Commission indicated that it would not apply the additional criteria to import and export of mixed oxide fuel (*ibid.*). But for those activities not subject to the additional criteria, as for the construction and operation of reprocessing and fuel fabrication plants, any interim license would have to comply with the Atomic Energy Act and NEPA.

[7] The petition for review filed by NRDC was joined by Sierra Club, Inc., Environmentalists, Inc., West Michigan Environmental Action Council, Inc., National Intervenors, Inc., and Businessmen for the Public Interest, Inc. (see Pet. App. A-35).

[8] The petitions asserted jurisdiction under 28 U.S.C. 2342(4) and 42 U.S.C. 2239 (see n. 13, *infra*).

NEPA.[9] The Commission contended that the interim policy statement did not constitute or involve a "final order," within the meaning of 28 U.S.C. 2342(4) and 42 U.S.C. 2239, and that its decision to consider applications for interim licenses did not violate NEPA or any other federal statute.

The court of appeals held that review of the Commission's interim policy statement was proper "since the Commission has made a final decision, after months of consideration, to the effect that it may proceed to interim licensing of mixed oxide fuel related activities without awaiting the release of [a generic environmental impact statement] or a final decision on wide-scale use" (Pet. App. A-53). The court also held that the Commission's policy on interim licensing would "circumvent the mandates of NEPA by granting interim licenses on the basis of records which exclude the generic aspects" (Pet. App. A-71). The court therefore "reversed" the interim policy statement, "insofar as it allows the granting of interim commercial licenses for mixed oxide fuel related activities" (Pet. App. A-73), and remanded the matter to the Commission.

The court subsequently issued a *per curiam* opinion on rehearing, seeking to distinguish this Court's inter-

[9] The petitions filed by NRDC and the State of New York also complained of the procedures specified in the interim policy statement for preparation of the generic impact statement. The court of appeals rejected the contention that the procedural guidelines set forth in the interim policy statement were deficient (Pet. App. A-55 through A-61). No party has sought review of that aspect of the court's decision.

vening decision in *Kleppe* v. *Sierra Club,* No. 75-552 (decided June 28, 1976). In its original opinion, the court had relied extensively on the court of appeals' decision in that case (Pet. App. A-63, A-64, A-68). On rehearing, the court stated that this Court's decision in *Kleppe* was not inconsistent with the decision in this case because "interim impact statements drafted in accordance with presently existing Commission rules and precedent would necessarily result in impact analyses inadequate under NEPA" (Pet. App. A-76). The court also noted that approval of the leases at issue in *Kleppe* did not commit the agency to issue other leases, but stated that in the present case "the proposed activity is 'clearly tied to the anticipated wide-scale use and would commit substantial resources to the mixed oxide fuel technology'" (*ibid.,* quoting from original opinion).

3. We agree with petitioners that the court of appeals' decision cannot be reconciled with this Court's decision in *Kleppe* v. *Sierra Club, supra.* This Court concluded in *Kleppe* that approval of "interim" mining plans could not be enjoined pending completion of a regional impact statement—unless the court found that the impact statements for the interim plans inadequately analyzed the environmental impacts of, and alternatives to, their approval (slip op. 15 n. 16).[10] This Court also rejected respondents' contention

[10] Specifically, this Court stated that (slip op. 15 n. 16)—"[e]ven had the Court of Appeals determined that a regional impact statement was due at that moment, it still would have erred in enjoining approval of the four mining plans unless it had made a finding that the impact statement covering them inadequately analyzed the environmental impacts of, and the alternatives to, their approval. So long as the statement covering them was adequate, there would have been no reason to enjoin their approval pending preparation of a broader regional statement * * *." See, *e.g., id.* at 22 n. 26; *Aberdeen and Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 325-326; *Union of Concerned Scientists* v. *Atomic Energy Commission,* 499 F. 2d 1069, 1081-1082 (C.A. D.C.).

that a regional impact statement was required because the plans or projects in question were "intimately related" (slip op. 15). At base, the latter contention amounted both to an attack on the sufficiency of the impact statements that petitioners had already prepared on the mining projects they had approved, or were about to approve, and upon petitioners' decision not to prepare a comprehensive impact statement on all proposed projects in the region. This Court rejected both lines of attack since, with respect to the first, the case had not been brought as a challenge to a particular impact statement and there was no impact statement in the record and, as to the second, respondents had not demonstrated that petitioners had acted arbitrarily in refusing to prepare a comprehensive impact statement (slip op. 15-22).

As in *Kleppe,* the court of appeals did not in the present case have before it an environmental impact statement alleged to be deficient in some respect under NEPA or another federal statute. Although the Commission had received three applications for interim commercial licenses for mixed oxide fuel facilities, Commission review of those applications—including

preparation of environmental impact statements—has not been completed (see Pet. App. A-19). Moreover, the Commission acknowledged in its interim policy statement the danger that certain licenses granted pending completion of the generic impact statement might prejudice the Commission's decision whether, and under what circumstances, to authorize the wide-scale commercial use of mixed oxide fuel. But the Commission provided in its interim policy statement that no such license applications would be granted pending completion of the generic environmental impact statement unless the criteria established by the Atomic Energy Act of 1954 and NEPA were met and, in addition, it was satisfied that (1) approval of the application was justified, from a NEPA cost-benefit standpoint, "without placing primary reliance on an anticipated favorable Commission decision on wide-scale use of mixed oxide fuel" and (2) the activity would not involve "an irreversible and irretrievable commitment of resources that would unjustifiably foreclose for the activity substantial safeguards alternatives that may result from the decision on wide-scale use" (Pet. App. A-25 through A-26). Under these circumstances, *Kleppe* clearly required the court of appeals to reject the claims made in the petitions for review of the Commission's interim policy statement.[11]

[11] The court of appeals believed that interim activities inevitably would be tied to the generic inquiry and would be accompanied by defective impact statements. Those beliefs cannot be tested rationally—and judicial intervention cannot properly take place—unless and until an interim license is granted and the accompanying final impact statement is challenged in court.

The court of appeals also erred in holding that the provisions of the Commission's policy statement dealing with interim licenses were reviewable. The Commission has not granted—indeed, may never grant—an interim license relating to the commercial use of mixed oxide fuel.[12] All the Commission has done is to inform the public that it will proceed to consider applications for such licenses, under specified criteria, prior to completion of the generic impact statement. In considering applications for interim licenses, and preparing the environmental impact statement that must accompany any decision to grant such a license, the Commission must "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact" entailed by the licensing decision. Section 102(2)(C) of NEPA, 42 U.S.C. 4332 (2)(C). But judicial review of the adequacy of the Commission's consideration of environmental impact would be appropriate only when, and if, the Commission decided to grant an interim license. Before that point there is no "report or recommendation" within the meaning of NEPA even if there is a "proposal."

[12] Even if it could be said that the Commission "contemplates" granting one or more interim licenses (but see discussion at page 13, infra), "the mere 'contemplation' of certain action is not sufficient to require an impact statement" (*Kleppe* v. *Sierra Club*, *supra*, slip op. 11-12).

As this Court pointed out in *Kleppe* (slip op. 14 n. 15):

> [T]he time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption.

Accord, *e.g., Aberdeen and Rockfish R. Co.* v. *SCRAP,* 422 U.S. 289, 320.

The Commission's decision to entertain applications for interim licenses permitting the use of mixed oxide fuel at particular facilities was thus a necessary first step in the licensing process. But it did not commit the Commission actually to make a "report or recommendation" on a proposal, in the form of a decision to grant an interim license. Thus, the court of appeals erred in reviewing that portion of the interim policy statement dealing with interim licensing since it did not have before it a "final order," within the meaning of 42 U.S.C. 2239 and 28 U.S.C. 2342(4).[13]

4. For the reasons stated, we believed that the court of appeals' decision is wrong. We have not petitioned for certiorari, however, because it is not clear that any applicants will be able to satisfy the criteria established by the Commission for the granting of interim licenses. Indeed, it is the prematurity of the court of appeals' decision that makes it impossible confidently to assess its impact. We therefore cannot say that this case is sufficiently important to warrant plenary review under this Court's rules. Nevertheless, we believe that there are substantial grounds supporting the petitions that have been filed. As petitioners have pointed out (Pet. No. 76-653, pp. 11, 17; Pet. No. 76-762, pp. 10-11; Pet. No. 76-769, pp. 8-10; Pet. No. 76-774, pp. 10-11), should national policy make interim licensing desirable, a compelled moratorium on such licensing pending completion of the generic impact study would preclude this course. In the current climate of concern regarding energy, it is important that the flexibility to take this course be preserved.[14]

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[13] Under 28 U.S.C. 2342, the courts of appeals have exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * (4) all final orders of the [Nuclear Regulatory Commission] made reviewable by section 2239 of title 42." The "final orders" made reviewable by 42 U.S.C. 2239 are those entered in proceedings "for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, [or] an award [of] royalties under [specified sections of Title 42]." See, *e.g., Ecology Action* v. *Atomic Energy Commission,* 492 F. 2d 998, 1000 (C.A. 2).

In the event the Commission were to grant an interim license, that action would of course be subject to judicial review. One of the issues which could properly be considered in the context of such a review proceeding would be the adequacy of the environmental impact statement accompanying the interim license.

[14] The court of appeals' decision may also discourage federal agencies from undertaking generic or regional environmental impact studies. Agencies may be reluctant to initiate such studies if by doing so they risk a judicial prohibition on related interim activities.

5. We therefore concur in the suggestion (Pet. No. 76–762, p. 19 n. 12) that it would be appropriate for this Court summarily to reverse the court of appeals' decision. See, *e.g.*, *Coleman* v. *Conservation Society of Southern Vermont, Inc.*, 423 U.S. 809; *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League*, 423 U.S. 12. Such action would simply preserve for the Commission the option of granting an interim license subject to full judicial review at thee proper time.

Respectfully submitted.

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